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Admitted in: MA, ME, NH

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Alexandra Dunn
Regional Administrator
EPA New England, Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Re: EPA's Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016)

Dear Administrator Dunn:

On December 19, 2016 EPA finalized human health criteria ("HHC") to apply in Maine in the wake of prior (2015) disapprovals of certain Maine Water Quality Standards ("WQS"). In doing so, EPA not only usurped the primary role of the state, which has existing WQS that comply with the Clean Water Act ("CWA"), but acted contrary to the Maine Indian Claims Settlement Acts,[1] as recently confirmed by the United States Court of Appeals for the First Circuit.[2] In short, the Final Rule erroneously presumes that the Maine Department of Environmental Protection ("Maine DEP") has failed to protect a designated use of sustenance fishing, which EPA now claims is part of the state's WQS. 81 Fed. Reg. 92466 (Dec. 19, 2016) ("Final Rule"). But sustenance fishing is not now, and never has been, a designated use under Maine law. EPA should correct this error by approving Maine's existing WQS and repealing its Final Rule.

The Final Rule Caps a Recent Departure from Long-Standing EPA Practice on Tribal Waters

The present dispute over Maine's jurisdiction in tribal waters began in 2001, when EPA approved the State's application to take over waste discharge permitting in Maine. 66 Fed. Reg. 12791 (Feb. 28, 2001). However, EPA granted this approval for all areas of Maine "outside disputed Indian territory." *Id.* at 12795. This sharp policy reversal ran contrary to decades of EPA practice, in which EPA consistently applied Maine's WQS in Indian waters pursuant to Maine's comprehensive water classification program, which was adopted in 1986 and approved by EPA in 1990. 38 M.R.S. §§ 464-470.

EPA continued to implement this new policy, concluding in 2003 that Maine had no jurisdiction to regulate discharges of pollutants from tribal wastewater treatment facilities, and expressing concern at that time that the State's permitting program might not adequately ensure water quality standards that protect sustenance fishing rights. 68 Fed. Reg. 65052, 65066-67 (Nov. 18, 2003). Maine disputed these

[1] The Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 ("MICSA"), and the Maine Implementing Act, 30 M.R.S. §§ 6201-6214 ("MIA"), collectively, "the Settlement Acts."
[2] *Penobscot Nation v. Mills*, 861 F.3d 324 (1st Cir. 2017).

conclusions before the First Circuit, which ultimately determined that the State has the right to regulate the quality of waters located in tribal lands. *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). It reconfirmed that Indian tribes are subject to the laws of Maine with very limited exceptions, and that the Settlement Acts, which govern Maine's authority vis-à-vis Maine tribes, establish that broad State authority. *Id.* at 41-46.

The Final Rule Incorrectly Adopts Sustenance Fishing Rights

Despite the *Maine v. Johnson* decision affirming Maine's statewide jurisdiction, EPA continued to limit its approvals of Maine's WQS revisions to non-tribal waters only, and took no action for an unspecified set of Indian waters until 2015. It was at that time that, in an apparent end-run around *Maine v. Johnson*, EPA suddenly pronounced a new designated sustenance fishing use in Indian waters, in its February 2, 2015 Decision on certain Maine WQS revisions. Conceding that Maine does have statewide jurisdiction, this Decision nevertheless disapproved various Maine WQS for unspecified Indian waters based on the convoluted rationale that Maine's human health water quality criteria for Indian waters did not reflect a designated use of tribal "sustenance fishing" for Maine's Indian waters, which EPA claimed is now part of the State's WQS. EPA's rationale formed the basis for promulgation of its Final Rule, which seeks "to address the Administrator's determination that Maine's HHC are not adequate to protect the designated use of sustenance fishing for certain waters." 81 Fed. Reg. 92466 (Dec. 19, 2016).

Sustenance fishing is not now, nor has it ever been, a designated use under Maine law. Maine's current designated uses for each class of fresh surface waters are listed in 38 M.R.S. § 465. There is no designated use for sustenance fishing by Maine tribes in this section, nor is there any such language in §§ 465-A or 465-B, which concern lakes and ponds, and estuarine and marine waters, respectively. Never has the Maine Legislature, the "sole authority" to make changes in designated uses, adopted a designated use of sustenance fishing. 38 M.R.S. § 464(2)(D). To the contrary, the Maine Legislature rejected a controversial 2002 proposal to create a similar "subsistence" designated use for limited portions of the Penobscot River only. Quite simply, sustenance fishing is not a designated use under Maine law.

Nor has EPA, or any party, followed the proper procedures for establishing a new designated use under Maine law. Prior to adding or removing any use or establishing subcategories of a use, the State must provide notice and opportunity for a "public hearing" under Section 131.20(b) of EPA's regulations and 38 M.R.S. § 464(2-A)(C). EPA, in promulgating its own WQS, is subject "to the same policies, procedures, analysis, and public participation requirements established for states" in the federal regulations. 40 C.F.R. § 131.22(c). But EPA has not complied with either the State's procedures or its own public participation regulations set out in 40 C.F.R. Part 25. Prior to issuing its Final Rule, EPA provided neither the required analyses nor an opportunity for a hearing on the establishment of its new designated use.

Instead, EPA unilaterally cobbled together its unexpected claim – that in exercising its statewide jurisdiction, Maine must ensure that fish in Indian waters are of sufficient quality for tribal sustenance fishing – through an incorrect interpretation of the Settlement Acts. In short, EPA believes that the Settlement Acts "provide for the Indian tribes to fish for their individual sustenance in waters in Indian lands and effectively establish a sustenance fishing designated use cognizable under the CWA for such waters." 81 Fed. Reg. 92466, 92475. Based on this interpretation of Maine law, the Final Rule

promulgates HHC for toxic pollutants and six other WQS that apply only to waters in Indian lands; two WQS for all waters in Maine, including waters in Indian lands; and one WQS for waters in Maine outside of Indian lands. EPA defines "waters in Indian lands" as those waters in the tribes' reservations and trust lands as provided for in the Settlement Acts. 81 Fed. Reg. 92466, 92468.

In its Final Rule, EPA repeats its wrongful assertion, also made in its February 2015 Decision, that "the settlement acts include extensive provisions to confirm and expand the tribes' land base. The legislative record makes it clear that a key purpose behind that land base is to preserve the tribes' culture and support their sustenance practices." 81 Fed. Reg. 92466, 92476. The Final Rule goes on to state that "EPA has concluded that one of the overarching purposes of the establishment of this land base for the tribes in Maine was to ensure their continued opportunity to engage in their unique cultural practices to maintain their existence as a traditional culture. An important part of the tribes' traditional culture is their sustenance lifeways."

But this statement wrongly suggests that the Settlement Acts provided for sustenance fishing outside the tribal reservations, which is a small subset of tribal lands. The Settlement Acts did not. To the extent that the Settlement Acts expanded the tribes' land base, they did so with additional trust lands, not reservation lands.[3]

This is evidenced by the First Circuit's recent confirmation that "the Settlement Acts unambiguously define 'Penobscot Indian Reservation' as specified islands in the Main Stem of the Penobscot River, and not the Main Stem itself or any portion of the Main Stem. The plain meaning of 'islands in the Penobscot River' is the islands in the River, not the islands and the River or the Riverbed." *Penobscot Nation v. Mills*, 861 F.3d 324, 332 (1st Cir. 2017) (emphasis original). In other words, that tribe's land base specifically excludes the waters in which they may seek to practice sustenance fishing. *Id.* at 331 ("When the Settlement Acts mean to address the various topics of water, water rights, or submerged land, they do so explicitly and use different language."). Further confirming the State's broad jurisdiction declared in *Maine v. Johnson*, the First Circuit established, in no uncertain terms, that the Penobscot River itself is outside of the Penobscot Reservation. Accordingly, the Penobscot Nation does not have sustenance fishing rights in the waters at issue.

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[3] Nor may tribal members engage in sustenance fishing when they are located in inland waters outside their reservations, including trust lands. Indeed, the Settlement Acts provide that the tribal members' sustenance fishing right is limited to the tribal reservations, which do not include trust lands. 30 M.R.S. §§ 6205 (distinguishing between tribal reservation land and tribal trust land), 6207(4) ("the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance ..."). Thus, it would be illegal for tribal members to engage in sustenance fishing when they are located in inland waters outside their reservations. The First Circuit recently supported this position when it reversed the opinion of the United States District Court for the District of Maine that sustenance fishing rights provided in 30 M.R.S. § 6207(4) allowed the Penobscot Nation to take fish for sustenance in the entirety of Main Stem section of the Penobscot River, even though the river is not within the reservation. Finding a lack of case or controversy, and that the tribe's claim is not ripe, the First Circuit determined that there is no evidence that "Maine has interfered with or threatened to interfere with the Nation's sustenance fishing in the Main Stem." *Penobscot Nation v. Mills*, 861 F.3d at 338. Nevertheless, the Court also noted that "there is not even an allegation that the State plans to change its informal policy of not interfering with sustenance fishing." *Id.*

By reading an implicit designated use into the Settlement Acts, EPA has federalized Maine's WQS and created a new designated use unwanted by the State in waters strictly within the State's jurisdiction. EPA should repeal or withdraw its federal WQS promulgation because there is no designated use of sustenance fishing in Maine's WQS.

The Final Rule Overlooks Maine's Broad Authority over Tribal Waters to Regulate WQS

Despite the State's broad, and repeatedly affirmed, environmental regulatory jurisdiction over waters located in tribal lands, EPA shoe-horned the limited right of the Southern Tribes[4] to take fish free from otherwise applicable State fish and game rules within their reservations into a tribal right essential to "continued political and cultural existence on [both the Southern and Northern Tribes'] land base." 81 Fed. Reg. 92466, 92476. This limited right has nothing to do with Maine's regulatory jurisdiction over the quality of all State waters.

Indeed, under MISCA Section 1725(a)-(b)(1) and MIA Section 6204, the Southern Tribes (like the Northern Tribes[5]) are subject to precisely the same water quality regulatory jurisdiction as the rest of the citizens of Maine. EPA is correct that its "analysis of the use and the protection of that use must necessarily focus on how the settlement acts intend for the tribes to be able to use the waters at issue here." 81 Fed. Reg. 92466, 92475. The limited sustenance fishing "take" right in MIA Section 6207(4) simply cannot displace Maine's jurisdiction to regulate the WQS of all State waters, even those located in Indian territory. *Maine v. Johnson,* 498 F.3d 37, 46 (1st Cir. 2007); *Penobscot Nation v. Mills*, 861 F.3d 324, 332 (1st Cir. 2017).

Yet, in issuing the Final Rule, the EPA usurped the State's function in setting its WQS. This is contrary to the CWA, which is "a program of cooperative federalism" in which States are principally responsible for implementing much of that statute. *New York v. U.S.*, 505 U.S. 144, 167 (1992); 33 U.S.C. § 1251(b). Under this principle of cooperative federalism, the CWA assigns to the state the primary authority for adopting water quality standards. 33 U.S.C. § 1313(a), (c). Once adopted, the EPA's role is limited. It must approve or disapprove state submittals of WQS within 90 days. 33 U.S.C. § 1313(a), (c); 40 C.F.R. § 131.S(a).

In Maine, EPA's failure to act on Maine's submittals stretched to 10 years in some cases. At the same time, EPA allowed Maine DEP to issue permits to potentially-affected facilities without comment. Accordingly, in 2014, Maine sued EPA for failure to approve its backlogged WQS. Nevertheless, EPA wrongfully disapproved a number of Maine WQS, mostly applicable to waters in Indian lands, and

[4] The Final Rule refers to the Penobscot Nation and the Passamaquoddy Tribe, collectively, as the Southern Tribes. It refers to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs, collectively, as the Northern Tribes.

[5] EPA wrongly assumes that the Northern Tribes also have a sustenance fishing right that may apply to waters within their trust lands, or even beyond those trust lands. However, the Northern Tribes have no sustenance fishing right, as the Settlement Acts grant that right only to the Southern Tribes, and only within their reservations. 30 M.R.S. § 6207(4) (establishing the limited right of members of the Southern Tribes to take fish free from otherwise applicable State fish and game rules provided that the fish is taken for individual sustenance). Under the plain language of the Settlement Acts, the Northern Tribes are, without exception, subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources," which expressly includes water, water rights, and fishing rights. 30 M.R.S. §§ 6203(3), 6204; 25 U.S.C. §§ 1722(d), 1725(a).

promulgated the Final Rule based upon an incorrect interpretation of Maine law and the Settlement Acts, as discussed above. Because EPA is required to approve state water quality standards that are consistent with EPA guidance and scientifically defensible methods, and because Maine's existing WQS meet CWA requirements, EPA should take action to approve Maine's WQS and repeal its Final Rule. CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3).

Thank you for your careful consideration of this matter.

Sincerely,

Matthew D. Manahan

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